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Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA,

4 v.

15 CR 73 (RMB)

5 EVGENY BURYAKOV, IGOR  
6 SPORYSHEV and VICTOR PODOBNYY,  
7

Defendants.  
-----x

8 New York, N.Y.  
9 March 3, 2016  
10 11:00 a.m.

Before:

12 HON. RICHARD M. BERMAN,

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
17 Southern District of New York

STEPHEN RITCHIN

EMIL BOVE

BRENDAN QUIGLEY

Assistant United States Attorney

SCOTT HERSHMAN

Attorney for Defendant Buryakov

G33aaburc

Conference

1 (Case called)

2 THE COURT: Please be seated.

3 So I'll note at the outset that we have a Russian  
4 language interpreter and we usually do that as standby process  
5 and ask Mr. Buryakov -- well, first of all, I guess we don't  
6 need an interpreter word-for-word; is that fair to say?

7 MR. HERSHMAN: That's fair, your Honor.

8 THE COURT: Just a standby precaution, OK.

9 Second, we had at my initiation we had a brief  
10 telephone conference yesterday at which it was my intention to  
11 give the lawyers for each side a heads-up that I would be  
12 asking first, we would do the arraignment today on the new  
13 superseding indictment, an S1 superseding indictment in this  
14 case and that I would ask counsel for the government briefly to  
15 describe S1 and how it differs from the previous indictment.

16 MR. BOVE: Yes, your Honor. Thank you.

17 The S1 superseding indictment contains the same  
18 charges that were in the underlying document. The differences  
19 are that the S1 streamlines some of the allegations, in  
20 particular, omits the overview section. It also alleges new  
21 overt acts that relate to more specific incidents individually  
22 one-by-one as opposed to overt acts alleged in the underlying  
23 indictment.

24 THE COURT: So there are still two counts; isn't that  
25 right?

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Conference

1 MR. BOVE: Yes, judge.

2 THE COURT: Could you just briefly identify what those  
3 two counts are.

4 MR. BOVE: Yes, your Honor.

5 Count One charges Mr. Buryakov as well as Igor  
6 Sporyshev and Victor Podobnyy with participating in a  
7 conspiracy to violate Title 18 U.S.C. Section 951. And Count  
8 Two charges those same defendants with the substantive  
9 violation of Section 951.

10 THE COURT: OK. Thank you.

11 Mr. Hershman, let me ask whether you have -- I'm sure  
12 have you but let me ask any way for the record whether you  
13 received this superseding indictment?

14 MR. HERSHMAN: Yes, your Honor, we've received it.

15 THE COURT: And whether you have discussed it fully  
16 with Mr. Buryakov?

17 MR. HERSHMAN: I have, your Honor, and I have some  
18 comments that I wanted to make about it whenever appropriate.

19 THE COURT: Well, in a minute. First, let's complete  
20 the arraignment. And did you wish to have me read it publicly  
21 at this time?

22 MR. HERSHMAN: No. We would waive the public reading.

23 THE COURT: What plea would Mr. Buryakov like to  
24 enter?

25 MR. HERSHMAN: Not guilty.

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Conference

1                   THE COURT: OK. So do you want to comment on the S1?  
2 I'll hear it.

3                   MR. HERSHMAN: Yes, briefly, your Honor, because it  
4 does relate directly to motions that are before your Honor that  
5 were filed the other day and I was a little troubled by what I  
6 heard yesterday during our conference with the Court regarding  
7 the purpose of the S1 which was to make it trial ready. I'm  
8 not really sure I understand what that is but --

9                   THE COURT: What was your trouble?

10                  MR. HERSHMAN: Well, the point is that we started this  
11 case with a complaint which was quite sensational and had a  
12 number of detailed allegations out of a spy novel of overt acts  
13 that no longer appear anywhere in the indictment. So, for  
14 example, there were clandestine meetings. There were secret  
15 codes. There were passings of bags and all sorts of  
16 sensationalisms and details relating to spy craft. A number of  
17 meetings that were in the complaint were huge, four dozen  
18 meetings in one particular case. The way that these meetings  
19 were described, clandestine methods and coded messages was  
20 quite elaborate and that served as the basis for the bail  
21 application that was made during the first arraignment on the  
22 complaint and before the magistrate.

23                  That complaint was followed by an indictment which was  
24 a public document that contained allegations still of  
25 Mr. Buryakov and other defendants being members of the Russian

G33aaburc

Conference

1 Foreign Intelligence, the SBR, and working together to gather  
2 all sorts of information and it still contained this overview  
3 that was just referred to and a whole host of allegations that  
4 now seem to have disappeared from S1, where we have now a very  
5 plain boilerplate indictment that says nothing about SBR,  
6 nothing about secret meetings and books and tickets and all  
7 sorts of other lists and things that were specified in the  
8 complaint. And I guess I'll leave to the trial the  
9 cross-examination of the agent who swore in the complaint and  
10 made these false allegations in the complaint concerning all of  
11 that and those coded messages and the like. I don't know  
12 whether that person is going to testify or not. I hope so.

13 But what we have now, your Honor, is an indictment  
14 that essentially alleges that by acting as a DEB representative  
15 and speaking with a representative of the Russian mission,  
16 Mr. Buryakov is somehow guilty of failure to register of 951  
17 with no reference at all to --

18 THE COURT: Let me just understand something here.  
19 So, is it your contention that the offenses charged in S1 would  
20 have any different United States Sentencing Guidelines range or  
21 impact under this S1 as the original complaint or the first  
22 indictment?

23 MR. HERSHMAN: I think the sentencing guidelines may  
24 not change, your Honor, but the nature of the allegations are  
25 significantly different and the state of affairs is

G33aaburc

Conference

1 significantly different. And you know, I believe that they  
2 removed all of this from the complaint first and then from the  
3 second, the first indictment second to get us to the point that  
4 we are now because they know that the government knows that  
5 it's not provable and we have these motions which are pending  
6 which relate directly to it.

7 And I just wanted to point out that this is our  
8 observation of the S1 which is significantly different than it  
9 was just to make the complaint, the indictment so-called trial  
10 ready and public. The other indictment was just as public as  
11 this by the way as was the complaint, and that we have filed a  
12 number of motions that address these issues.

13 THE COURT: So are you saying that the motions are no  
14 longer or some of them not pertinent?

15 MR. HERSHMAN: No. The motions are now more pertinent  
16 than they were before.

17 THE COURT: So I'm trying to figure out if you are  
18 saying there was any prejudice to you as a result of the filing  
19 of the S1.

20 MR. HERSHMAN: The prejudice relates really to  
21 Mr. Buryakov's status, his bail status frankly. To be honest,  
22 I think that had this S1 been the charging instrument at the  
23 time of the bail application initially that circumstances would  
24 be very, very different. I think that it does impact the  
25 import of our motions significantly and we've addressed the

G33aaburc

Conference

1 issues that we think S1 raises in these motions in limine.

2 THE COURT: For the record, no bail application or  
3 review has ever been sought before me.

4 MR. HERSHMAN: Correct. And I'm not ruling out that  
5 we weren't going to --

6 THE COURT: You are always entitled to that. You do  
7 that in writing.

8 MR. HERSHMAN: Yes. We understand your Honor wants  
9 that in writing, so we.

10 THE COURT: OK. Did you want to comment?

11 MR. BOVE: Yes, your Honor. The filing of an  
12 indictment like the S1 in this case that simply tracks the  
13 statutory language as the parties prepare for trial is a  
14 frequent and common practice in this district. Our position is  
15 that defense counsel has read far too much into the differences  
16 between the underlying indictment and this document. The  
17 complaint in this case still stands. Our theory of the case as  
18 it relates to the relevance of the SBR has not changed.

19 As defense noted, these are issues that are raised in  
20 motions that they filed this week. We'll respond in due course  
21 pursuant to the schedule by the Court and make very clear our  
22 that our theory and the way we will be presenting evidence in  
23 this case and the relevance of SBR are very much on the table  
24 as they have been throughout the case.

25 THE COURT: All right. So as we're heading toward

G33aaburc

Conference

1 trial and as I indicated in the telephone conference yesterday,  
2 I was going to and am raising the issue, I've sent the notice  
3 out yesterday dated March 2, 2016 inquiring of counsel whether  
4 the issues raised in Missouri v. Frye and Lafler v. Cooper, two  
5 Supreme Court decisions, have been fully explored with  
6 Mr. Buryakov. And in particular what I wanted to ask for the  
7 record is whether Mr. Buryakov is fully aware of all of his  
8 options that he might have to resolve this case other than  
9 going to trial.

10 So that implicates the question of whether there are  
11 plea discussions or plea negotiations or whatever and whether  
12 all of that has been communicated to Mr. Buryakov. So I'll  
13 hear first from counsel and then if it's OK with counsel, I'll  
14 ask Mr. Buryakov if he feels that he understands fully what his  
15 alternatives or options are.

16 MR. HERSHMAN: That's fine with me, your Honor. You  
17 are welcome to ask Mr. Buryakov those questions. There's no  
18 issue that we have reviewed fully all of the implications that  
19 are addressed in Frye and Lafler, not just after your Honor's  
20 call but during the course of the representation.

21 And Mr. Buryakov as you've just heard him plea is not  
22 guilty to the charges. And briefly our view on the S1 which --  
23 and we have these motions which we believe will resolve the  
24 matter in Mr. Buryakov's favor.

25 THE COURT: So have there been any discussions about

G33aaburc

Conference

1 resolving short of a trial and have they been passed along to  
2 Mr. Herschman and to Mr. Buryakov?

3 MR. BOVE: I can address the first part of that, your  
4 Honor. There were negotiations in late summer and early fall  
5 of 2015 as well as last month. In neither of those instances  
6 did the government formally extend a plea offer.

7 THE COURT: OK. So then, Mr. Buryakov, let me just  
8 ask you for the record, would you feel you have been fully  
9 apprized of all of your options in connection with this case  
10 which is scheduled to start trial pretty soon?

11 THE DEFENDANT: Oh, yes, your Honor. We discussed  
12 this with my lawyer and I fully understand the consequences of  
13 the implications.

14 THE COURT: Thank you.

15 So as a housekeeping matter I don't think-- I think  
16 I've got enough submissions. So I usually at this point and if  
17 I have thought about it perhaps even earlier would have said,  
18 no more submissions, but I am saying it now. I think with the  
19 exclusion of this mention of a bail application, that's  
20 something entirely different. And there are some responses, of  
21 course, to outstanding motions which are not affected at all.

22 Mr. Hershman, the fact that there's an S1, does that  
23 impact your ability to be ready? I think we have a trial date  
24 of April 4. Is that still OK with you?

25 MR. HERSHMAN: Yes, your Honor.

G33aaburc

Conference

1                   THE COURT: OK. I think that really is it. That was  
2 on my agenda for today. Anybody have anything else?

3                   MR. BOVE: No, your Honor. Thank you.

4                   MR. HERSHMAN: Thanks, your Honor. No.

5                   THE COURT: OK. Somebody had inquired -- I think it  
6 was on the defense's side about trial practices. So I'll spend  
7 a minute or so telling you how I pick a jury.

8                   So usually, fundamentally, I do a pretty quick trial.  
9 That is to say I like to utilize as much of the day as possible  
10 with the jury present so that they're not standing around or  
11 sitting around in the jury room. So I move as expeditiously as  
12 possible. I don't do very many side bars. Sometimes they are  
13 necessary and we'll have them. They're mostly, in my  
14 experience, held during the course of the voir dire which gives  
15 the potential juror an opportunity to discuss private issues,  
16 essentially, private to them that they don't want to discuss in  
17 public.

18                  Now as to selection, we've asked for a pool of 75. We  
19 begin with for cause a series of for cause questions trying to  
20 determine whether for legal reasons people would not be  
21 appropriate to serve as jurors. So for example, if they're  
22 related to one of the parties or the lawyers, etc.

23                  And once we finish the for cause we move to preemptory  
24 challenges. In this case we would probably want to select 15  
25 jurors. Twelve would ultimately be the primary jurors and

G33aaburc

Conference

1 three would be alternates. So to get to that number we would  
2 need to seat initially 33 jurors. The defense gets ten  
3 peremptory challenges. The government gets six. And then for  
4 the alternates, each side gets one additional preemptory  
5 challenge.

6 We call the names of the jurors randomly from the  
7 wheel. If a juror has responded affirmatively to any of the  
8 questions that have been posed by the Court up until that  
9 point, we ask them to come up and explain the answer and or if  
10 there are any additional 'yes' answers.

11 If a juror is called randomly, if their name is picked  
12 randomly out of the wheel literally and they have no 'yes'  
13 answers they can proceed directly to the jury box. As I say,  
14 we'll seat between the jury box and the first row or two in the  
15 audience 33 people in order to wind up with 15 following the  
16 peremptory challenges.

17 Your estimates are probably as good or better than  
18 mine as to how long the trial will last. It will go however  
19 long it needs to go so that the defendant gets a fair trial.

20 I think that's about it unless anybody has any  
21 specific questions.

22 MR. HERSHMAN: Your Honor, I just want to introduce to  
23 the Court two of my colleagues. One may be familiar to you,  
24 but on my far right is Kim Haviv and Greg Little.

25 MR. LITTLE: Good morning, your Honor.

G33aaburc

Conference

THE COURT: They'll be assisting you at trial?

MR. HERSHMAN: Yes, among and with Mr. Levin.

THE COURT: I forget if you've already submitted everybody's name and we'll want to mention that.

MR. HERSHMAN: I think we have. We're all good there.

THE COURT: OK.

MR. HERSHMAN: We may have a question about --

8                   MR. LITTLE: On the side bar when someone answers  
9 affirmatively and we come up, will your Honor be asking all of  
10 the follow-up questions?

11 THE COURT: Yes. It's usually pretty obvious. If I  
12 miss something an attorney might catch my eye and say, could  
13 you ask this or something like that, but usually it's pretty  
14 straightforward and pretty obvious.

15 Great. All right. Well, I think that concludes our  
16 work for today. We'll see you on March 10 or our pretrial  
17 conference.

18 || Good to see you all.

(Adjourned)